

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

COURT OF APPEAL CIVIL APPEAL NO 41 OF 2001
HIGH COURT MISCA NO 196 OF 2001

IN THE MATTER OF:

VARAIDZO MUTEMACHIMWE

APPELLANT

AND

LAW SOCIETY OF BOTSWANA

RESPONDENT

ADVOCATE PETER FOR THE APPELLANT
MR. D.B. LEBURU FOR THE RESPONDENT

J U D G M E N T

CORAM: TEBBUTT A.J.P.
 ZIETSMAN J.A.
 PLEWMAN J.A.

ZIETSMAN JA:

The appellant, who is presently resident in Zimbabwe, applied to the High Court in Lobatse for an order admitting her to practise as an attorney in the Courts of Botswana. Her application, which was opposed by the Law Society (the present respondent), was not successful and she now appeals to this Court against the order dismissing her application.

The matter is governed by the Legal Practitioners Act No. 13 of 1996. Subsections (a), (e), (f) and (g) of Section 5 of that Act are relevant and they provide as follows:

- “5. A person who is a citizen of a Commonwealth Country (including a citizen of Botswana) shall be qualified to be admitted as a legal practitioner if he satisfies the Court that –
- a) he is a fit and proper person;
 - e) he has been admitted, has done his pupillage and is entitled to practise as an attorney or solicitor in any Division of the Supreme Court of the Republic of South Africa or in the High Court of Zimbabwe; and
 - f) he is ordinarily resident in Botswana or intends to reside permanently in Botswana; and
 - g) there is a reciprocal provision in the law of the Commonwealth country of which he is a citizen to permit a citizen of Botswana qualified in terms of the laws of that country to be admitted to practise in that country.”

The respondent opposed the application on three grounds. It was submitted that the applicant had failed to establish

- a) that she is a fit and proper person;
- b) that she has the intention to reside permanently in Botswana; and

- c) that the reciprocal provision referred to above is provided for in the law of the country of which she is a citizen.

The application was argued before the Chief Justice in the High Court in Lobatse. His conclusion was that the appellant had succeeded in establishing that she is a fit and proper person to be admitted to practise as an attorney in Botswana, and that the required reciprocal provision is contained in the law of Zimbabwe, the country of which she is a citizen. He, however, dismissed the application on the ground that the appellant, who is not ordinarily resident in Botswana, had failed to prove an intention on her part to reside permanently in Botswana.

No cross-appeal was noted by the respondent and it was not submitted in argument before us that the Chief Justice had erred in his finding that the appellant had established that she is a fit and proper person and that the reciprocal provision referred to above is contained in the law of the country of which she is a citizen. The sole question argued before us was whether the Chief Justice had erred in his finding that the appellant had failed to prove, on a balance of probabilities, that she intends to reside permanently in Botswana.

In her petition and affidavits the appellant alleges, inter alia;

1. That she was born in Zimbabwe and that she is a citizen of that country;

2. That she has been admitted and is entitled to practise as an attorney in Zimbabwe;
3. That she has been offered employment with the firm of Modimo and Associates who practise as attorneys in Gaborone, and that she has accepted the offer;
4. That since April 2001 she has been in the process of disposing of her assets in Zimbabwe, including her house there, with a view to relocating to Botswana;
5. That she had lodged an application with the Department of Immigration and Citizenship for a work permit and a resident permit entitling her to reside and work in Botswana;
6. That it is her intention to reside permanently in Botswana.

In his judgment dismissing the appellant's application the Chief Justice compares the 1996 Legal Practitioners Act with the earlier legislation and makes the point that the intention of the legislature in 1996 was to make it more difficult for foreign attorneys and advocates to practise in Botswana. He, however, quite correctly comes to the conclusion that if an applicant complies with the requirements of the Act the Court must grant the application.

In the present case what the applicant had to prove, inter alia, was that she intends to reside permanently in Botswana. The proof required is proof on a balance of

probabilities. See e.g. Webber v. Webber 1915 A.D. 239, at 250; Dance v. Dance (2) 1976 BLR 43; Sergeant v. Sergeant 1983 BLR 61.

In his judgment the Chief Justice draws a distinction between two possible situations. The one is where an applicant attorney's main purpose is to work in Botswana. To achieve this purpose she has to be admitted to practise her profession before the Courts of Botswana, and in order to be so admitted she has to prove that she ordinarily resides in the country or that she has the intention to reside permanently in the country. The other situation is where the applicant attorney's main purpose is to reside permanently in Botswana. In this case her need to obtain work in Botswana is simply a consequence of her decision to relocate to Botswana. The Chief Justice states that in the present case it is not possible to decide into which of the two scenarios the appellant's case falls. He seems to have assumed that it falls into the first situation mentioned above, namely that the appellant's main purpose is to accept the work offered to her in Botswana and that it is for this reason that she has to be admitted to practise here and has therefore made the statement that she intends to reside permanently in this country. He came to the conclusion that the evidence presented to the court by the appellant was equivocal and was not sufficient to prove a genuine intention on her part to reside permanently in Botswana.

Being apparently of the view that the appellant's main purpose was to accept the position offered to her in Botswana the Chief Justice, it seems, felt that she had a strong motive to state that she intends to reside permanently in Botswana, and that this statement by her required more support than the rest of the evidence provided.

The fact that an applicant may have a strong motive for stating that she intends to reside permanently in Botswana is a factor to be taken into consideration, but this does not mean that the evidence of her intention should be rejected. This is clearly stated in the case of Scarr v. Scarr 1971 (2) BLR 44 and is confirmed by this Court in the Dance case mentioned above.

In certain of the authorities quoted to us by counsel four possible situations are referred to. These are

1. Where a person intends to reside in a country for a definite period, and then to leave;
2. Where a person intends to reside in a country until a definite purpose is achieved, e.g. until a particular piece of work is completed;
3. Where a person intends to reside in a country for an indefinite period, i.e. until and unless something, the happening of which is uncertain, occurs to induce the person to leave; and
4. Where a person intends to reside in the country forever.

The first two situations would not satisfy the requirement of an intention to reside permanently in the country. The fourth situation quite clearly would. The question is whether the third situation satisfies the requirement.

In the case of Kenyon v. Kenyon and Jenkins 1974 (1) BLR 2 the then Chief Justice, Aguda CJ, stated that what is required is proof of an intention to reside permanently or for an unlimited time in the country. It is not necessary to prove an intention never to leave the country. This statement by Aguda CJ was accepted as being correct in the Dance case (supra). Proof of the third situation mentioned above would thus satisfy the requirement of an intention to reside permanently in the country.

In the case of Scarr v. Scarr 1971 (2) BLR 44 Rooney, then the Acting Chief Justice, stated, quite correctly, that a mere statement by an applicant that he intends to reside permanently in Botswana is not sufficient proof thereof. However, if he gives such evidence in positive and unequivocal terms his evidence should not be rejected merely because he has a strong motive for giving it. In a later case, the case of Dance v. Dance, which was taken on appeal and is referred to above, the same Judge commented that his statement in the Scarr case must not be interpreted to mean that the court will necessarily rely upon the unequivocal and credible testimony of the person claiming domicile in every case. On appeal it was held that

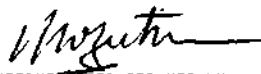
this statement by Rooney J was a misdirection. If a person gives credible evidence of his intention to reside permanently in Botswana he will, if believed, have discharged the onus resting upon him.

In opposing the appeal Mr. Leburu referred us to several cases which dealt largely with persons who had come to Botswana after being offered government contracts to perform work here. Where the courts came to the conclusion that after the contracts had expired, these persons would go to wherever prospects of further lucrative work would take them, it was held that the intention to reside permanently in Botswana had not been proved. This is not the case here.

In the present case the appellant has been offered a position with a firm of attorneys in Gaborone which position she has accepted. Her association with the firm will be for an unlimited, and not for a limited, period. Her statement of intention to leave Zimbabwe permanently and to move to Botswana is borne out by the undisputed facts that she has sold her assets in Zimbabwe and has applied for a work permit and a resident permit in Botswana. Her statement that she intends to reside permanently in Botswana is unequivocal and there is nothing in the papers to cast doubt upon her statement. It is true, as pointed out by Mr. Leburu, that she has not given any information about other members of her family and whether she has any children, and she does not state what salary or remuneration she has been offered by Modimo and Associates. One might, in most circumstances, have

expected her to provide the court with this information, but despite this omission it is our conclusion that the Chief Justice erred in finding that she had failed to discharge the onus of proving, on a balance of probabilities, that it is her intention to reside permanently in Botswana.

In the result the appeal succeeds. The order by the Chief Justice dismissing the appellant's application is set aside and an order is granted in terms of prayers (a) and (b) of the appellant's petition dated 6 August 2001.



 N.W. ZIETSMAN
 JUDGE OF APPEAL

I AGREE:



 P.H. TEBBUTT
 ACTING PRESIDENT

I AGREE:



 C. PLEWMAN
 JUDGE OF APPEAL